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ABUSE OF WEAKNESS, TRUST OR DEPENDENCE IN EUROPEAN AND AMERICAN SYSTEMS: FROM THE VIEWPOINT OF COMPARATIVE LAW *

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SUMMARY: I. Introduction. II. Taking advantage of circumstances not created by the party to the contract that suppose asymmetry in the negotiation: description of the legal concept. III. Configuration of abuse of circumstances in different legal systems: 1. Abuse of circumstances as pure defect of consent. 2. Systems that establish abuse of circumstances attending to lack of freedom in consent and imbalance between benefits. 3. Abuse of circumstances as a limit to private autonomy. IV. The consequences of abuse of weakness, trust or dependence on the contract: 1. Contract invalidity. 2. Compensation for damages. 3. Adapting the contract. V. Third-party abuse of circumstances.

I. Introduction

Most legal systems include the need to provide a solution for cases in which one of the parties to a contract, although they may not have created the circumstances that suppose asymmetry in the negotiation (as would be the case with *dolus* or wilful misconduct and intimidation), they take advantage of this asymmetry in order to conclude a contract under advantageous conditions. To illustrate this issue, I will use two cases as my starting point:

1) The first one is a Spanish case, decided by the Supreme Court Ruling of 15 July 1987[1], which discussed the validity of two deeds of sale for property. The seller was a foreign woman of advanced years, who lived alone and lacked a family environment and affection, devoting her life and attention to looking after animals. The buyers took advantage of these circumstances of solitude and isolation, who 'won her full and absolute trust', becoming an essential and constant part of her life, taking on and sharing with her the care and attention of the animals. They thereby managed to convince her that it would be expedient to transfer ownership of an apartment in Madrid and a large estate in Almería to them, at a value far below the market price. The Supreme Court considered that, in this specific case and as established by art.

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[1] *RJ* 1987\5494.

1269 CC Spain, the grounds were present to avoid the contract due to *dolo vicio*; i.e. *dolus malus* or fraudulent intent regarding consent.

2) The second one is a French case which gave rise to the important adjudication given by the Court of Cassation on 3 April 2002[2]. The facts on trial were as follows: by means of an agreement signed in 1984, Mme. Kannas, a writer employed by the publisher Larousse-Bordas since 1972, granted the latter exclusive rights to exploit her dictionary *Mini débutants*, for the sum of 30,000 francs. In 1996, Mme. Kannas was dismissed and the following year demanded the contract be avoided on the grounds that it was concluded in a state of economic dependence and under fear of losing her job. The *TGI* of Paris rejected the claim due to prescription; a ruling that was appealed before the *Cour d'Appel de Paris*, which found for the avoidability of the contract. In its ruling, the *Cour de Cassation*, although it set aside the decision of the *Cour d'Appel de Paris*, accepted that a situation of dependence could have invalidated consent due to *vice de violence* or duress.

This brief sample serves to highlight the diversity of mechanisms used to respond to the problem of abuse of weakness, trust or dependence in comparative contractual law and which will be studied here. There follows an analysis of the consequences of abuse of circumstances for contracts in different systems. And finally we examine the particular situation of a third party taking advantage of such circumstances.

II. Taking advantage of circumstances not created by the party to the contract that suppose asymmetry in the negotiation: description of the legal concept

There are occasions when the consent of one party to a contract is not freely given, not because of an error or deceit (*dolus* or wilful misconduct) or coercion (duress) but because the party's particular situation of weakness, need, dependence or relationship of trust with the other party has impelled it to accept contractual conditions which, under other circumstances, it would not have accepted.

A simple examination of the doctrines which, in comparative law, provide a remedy for the injured party in such situations, reveal the complexity of the legal concept and its multifaceted nature since this involves conceptions of commutative justice, on the one hand, and moral censure of the conduct of one of the parties on the other hand. Consequently, to properly comprehend the scope of this issue, we must go beyond the pure theory of "vices" or defects of consent and attend to objective aspects of unfair lack of equivalence between benefits, based on a subjective perspective because one party has exploited their position of superiority over the other, or the relationship of trust between them[3]. Consequently, it may be stated that, as defect of consent, the legal concept becomes a hybrid of duress and wilful misconduct but, in its configuration, we must also take into account considerations related to *laesio enormis.*

[2] No. 00-12932, *JurisData* no. 2002-013787.

[3] In this respect, M.A. Malo Valenzuela, "Los vicios de la voluntad en los Principios de Derecho contractual europeo", *RCDI* no. 689, May-June 2005, consulted in Vlex.

Both subjective and objective aspects are therefore involved in this case: the idea of abuse or exploitation of a situation of weakness or trust of one of the parties to a contract, and the other party obtaining an unfair advantage. As we will see, the relative weight given to each of these aspects varies in the different legal systems and will be analysed in the next section, but here I would like to discuss some related problems.

Regarding the subjective aspect: should emphasis be placed solely on the condition of the party to the contract whose will has been obstructed? Or must there be reprehensible conduct by the party taking advantage of the circumstances to obtain benefit? On the other hand, when does conduct contravene the rules of good faith?

And concerning the objective aspect: when does “unfair advantage” occur? In other words, how can the value of a "fair" benefit be determined? Evidently, in such cases the commutative principle cannot be referred to the parties’ agreement. So how is this measured? Some legal systems take "value" to mean the market value but it must be remembered that sometimes this market value cannot be assessed, for example in the case of a unique good. We should also note that the excessive disparity between benefits must be inherent and occur at the time the contract is concluded. If such disproportion occurs ex post facto, then the case would be one of "hardship".

III. Configuration of abuse of circumstances in different legal systems

1. Abuse of circumstances as pure defect of consent

Some legal systems establish this case as pure defect of consent; i.e. they markedly tip the balance towards the subjective aspect, focusing on the lack of freedom in forming the contract and not on the fairness of its content.

This is the case in Dutch law, where art. 3:44 (4) BW does not require the contract to suppose excessive injury for the weak party but it is enough that a party to the contract, even when it is or should be aware of the special circumstances that make the other party vulnerable, has persuaded the other party to conclude the contract[4].

And along the same lines, albeit with some slight differences, there is the doctrine of “undue influence” in Anglo-Saxon systems.

Traditionally, English law has distinguished between two types of undue influence: actual and presumed. But it was in *Barclay’s Bank Plc v. O’Brien* (1994)[5] when Lord Browne-Wilkinson adopted a classification that had already been established by the Court of Appeal in *Bank of Credit and Commerce International SA v.*

[4] Art. 3:44 (4) Dutch CC: ‘Abuse of circumstances is legally present when someone who knows or should have known that another person might be induced to perform a juridical act because he is under the influence of particular circumstances, like a state of emergency, dependency, thoughtlessness, an addiction, an abnormal mental condition or inexperience, nevertheless has stimulated this other person to perform this juridical act, although what this someone knew or should have known, should have refrained him from doing so’.

[5] 1 A.C. 180, 189-190.

Aboody (1989)[6], labelling actual undue influence as Class 1 and presumed undue influence as Class 2. In turn, this last category was subdivided into those cases where the mere existence of a certain relationship between the parties allows the existence of undue influence to be presumed (Class 2A); and those cases in which presumption would require proof of the existence of a relationship of trust or dependence between the parties (Class 2B). However, this classification has been considered misleading by the doctrine and was criticised in the case of *Royal Bank of Scotland v. Etridge (No. 2)* (2001)[7]. In this important judgment, the House of Lords recognised that the custom of distinguishing between actual and presumed undue influence 'can be confusing' and highlighted the need for proof. It therefore follows that there is a single doctrine of undue influence and only the manner in which this is applied can differ: either by means of direct proof of the abuse; or by means of a rebuttable presumption (*praesumptio iuris tantum*) in those cases where the contract, given its conditions, 'calls for explanation'[8].

In the case of actual undue influence (Class 1), the complainant must provide proof of the acts of coercion, control, dominance or abuse of trust (e.g. threats of ending a sentimental relationship, abuse of a person who is ignorant, weak of character or vulnerable[9], etc.) and also of the reprehensible nature of the agent's conduct[10], but since *CIBC Mortgages v. Pitt* (1994)[11] the contract does not have to suppose a manifest disadvantage for the victim for it to be avoided. Here the emphasis is on the subjective aspect and the key lies in demonstrating that the party to the contract could not act according to its own judgment[12].

Regarding presumed undue influence, its basic elements were established in the aforementioned judgment from *Royal Bank of Scotland v. Etridge (No. 2)* (2001) and they are as follows:

a) The first requirement is the existence of a bond of trust or dependence between the parties.

In some cases, it is not necessary to prove the bond of trust or dependence but, there being a certain relationship between the parties, this is presumed *juris et de jure* (Class 2A). This occurs, for example, between a parent and child, guardian and ward;

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[6] (1990) 1 Q.B. 923.

[7] [2001] UKHL 44; [2002] 2 A.C. 773.

[8] *Vid.* H.G. Beale, *Chitty on Contracts,* 30th ed., London, Sweet & Maxwell, Thomson-Reuters, 2008, § 7-059, p. 627; J. Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer,* 2nd ed., Oxford and Portland (Oregon), Hart Publishing, p. 186; and E. Peel, *The Law of Contract,* 13th ed., London, Sweet & Maxwell, 2011, § 10-014, p. 448.

[9] The leading case in this matter is *Williams v. Bayley* (1866) LR 1 HL 200.

[10] In *Dunbar Bank Plc v. Nadeem* (1998) 3 All E.R. 876, 883-884, the court ruled in this way, that '[t]he court of equity is a court of conscience. It sets aside transactions obtained by the exercise of undue influence because such conduct is unconscionable'.

[11] 1 A.C. 200.

[12] H.G. Beale, *supra,* § 7-065, p. 630-631.

trustee and beneficiary; and solicitor and client[13]. We should also add the doctor-patient relationship [*Curtis v. Curtis* (2011)[14]] and, with some doubts, that of fiancé and fiancée [*Re Lloyd's Bank* (1931)[15]; *Zamet v. Hyman* (1961)[16]; *Leeder v. Stevens* (2005)[17]], although this list is not complete or exhaustive; but presumption does not apply in the case of husband and wife[18]. This presumed existence of trust or dependence is irrebuttable but it cannot directly be the grounds to avoid a contract. Rather it can only help to legally establish one of the elements of presumption *juris tantum* of undue influence[19].

In other cases, the party to the contract claiming they have been affected by presumed undue influence must prove de facto that they have placed their trust in the other party or have a relationship of dependence (Class 2B). From the jurisprudence we can cite the cases of husband and wife [*Barclays Bank v. O'Brien* (1994)[20]]; uncle and nephew [*Tate v. Williamson* (1986)[21]]; banker and client [*Lloyd's Bank v. Bundy* (1975)[22]]; aged businessman and secretary [*Re Brocklehurst (deceased)* (1978)[23]], etc.[24].

b) The second of the elements is that the contract 'calls for explanation'; i.e. that it cannot easily be explained due to the relationship existing between the parties to the contract. This requirement supposes a reformulation, carried out by the *Etridge* judgment, of the traditional assumption of 'manifest disadvantage', as the courts warned that this rule, although perhaps suitable for commercial relations, was too narrow for relations without a commercial component[25].

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[13] *Vid. Royal Bank of Scotland v. Etridge (No. 2),* at 18: '[e]xamples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship'.

[14] EWCA Civ 1602.

[15] 1 Ch 289.

[16] 1 W.L.R. 1442, 1445.

[17] EWCA Civ 50.

[18] *Vid.* E. McKendrick, *Contract Law,* London, Palgrave, 2015*,* p. 301-302; E. Peel, *supra,* § 10-022, p. 453, and extensively, H.G. Beale, *supra,* §§ 7-074 to 7-077, pp. 636-637.

[19] *Vid.* H.G. Beale, *supra,* § 7-078 and E. Peel, *supra,* § 10-022, p. 454

[20] 1 A.C. 180.

[21] LR 2 Ch App 55.

[22] QB 326.

[23] Ch 14.

[24] For an extensive catalogue of examples, *vid.* H.G. Beale, *supra,* § 7-084, p. 641.

[25] And this is because, in civil contracts between people united by a family relationship or another bond of trust, it is relatively common for the balance between benefit and consideration not to attend to market parameters. But this does not mean that there has been abuse; taking advantage of the relationship, the transaction has merely occurred under favourable terms for one of the parties. Consequently, the new test expressed in the crude linguistic terms of 'calling for explanation' is more in

Should the above elements occur together, the presumption of undue influence operates *juris tantum*, so that it can be weakened by means of proof to the contrary, putting the onus on the party to the contract in whom trust was placed. In principle, any evidence that the desire to enter into a contract was formed freely and conscionably is enough. But in practice the way to weaken the presumption is almost always by proving that the party to the contract has received advice from an independent expert before concluding the contract[26].

In the United States, the courts took up the concept of undue influence at the end of the 19th century and, today, section 177 Restatement second of contracts describes it as 'unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare'. But US law is not concerned about the complicated English classification of undue influence. It rather makes a much simpler between those cases which do not involve lawyers and those that do[27]. In the latter, given the special relationship of trust and loyalty which unites a lawyer and client, if the contract is questioned as a result of undue influence, the courts impose on the lawyer the burden of proof that the will of the other party was formed freely[28].

2. Systems that establish abuse of circumstances attending to lack of freedom in consent and imbalance between benefits

Other legal systems, although they establish the case as defect of consent, also attend to the objective aspect; i.e. the lack of balance in the content of the contract.

This is the case of France where, after the reform carried out of the *Ordonnance* of 10 February 2016, abuse of a dependent condition is covered by art. 1.143 CC France. The precept stipulates that *'il y a également violence lorsqu'une partie, abusant de l'état de dépendance dans lequel se trouve son cocontractant, obtient de lui un engagement qu'il n'aurait pas souscrit en l'absence d'une telle contrainte et en tire un avantage manifestement excessif*'. As can be appreciated, what

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line with the essence of this type of case (*Cf.* P.S. Atiyah and S.A. Smith, *Atiyah's Introduction to the Law of Contract,* 6th ed., Oxford, Clarendon Press, 2005*,* p. 286).

[26] *Vid.* M.P. Furstom, *Cheshire, Fifoot & Furstom's Law of Contract,* 15th ed., Oxford, Oxford University Press, 2007, p. 396; P.S. Atiyah and S.A. Smith, *supra,* p. 287; H.G. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law,* Oxford-Hart Publishing, 2010, p. 588.

One example of the difficulty in rebutting presumption in civil procedure is the case of *Hammond v. Osborn* (2002) EWCA Civ 885, when the expression of his intention to leave a large part of his wealth to his friend and neighbour, carried out on numerous occasions by Mr. Hammond, was not enough to consider that his will was free since the courts viewed these declarations with the same suspicion as the donation under dispute, and they stressed that the donor had not received independent advice of any kind.

[27] *Vid.* extensively on the matter, J. Perillo, *Contracts*, 7th ed., United States, West Academic Publishing, 2014, pp. 301-305.

[28] *Bauermeister v. McReynolds,* 254 Neb. 118, 575 N.W.2d 354 (1998); *In Re Corporate Dissolution,* 132 Wash.App. 903, 134 P.3d 1188 (2006).

is characteristic of French law is that it does not establish this as an independent *vice* or defect but positively establishes *jurisprudence constante* of the Court of Cassation, definitively laid down since the important judgment of 3 April 2002 (whose case is mentioned at the beginning of this study), which placed the defect within "violence", calling it "economic violence"[29].

The new precept limits the subjective appreciation of the defect to situations of abuse of dependence (without referring to abuse of trust or weakness)[30], but does not limit this expressly to economic dependence; so that, in principle (still lacking jurisprudential interpretation of the precept), all suppositions of dependence (psychological, related to an illness or the age of the person, etc.) can be included within the rule's factual circumstances[31]. From the objective point of view, there is the requirement to obtain a "manifest advantage" which was not in art. 1.143 of the *Projet d'ordonnance* published in 2015, an absence which had been praised by the doctrine because it distanced *abus de faiblesse* from the legal concept of injury[32].

Spain is within the small group of European systems that do not have general positive regulations for this area. Outside the limited case of a "usurious loan" (*préstamo usurario*) in the Ley de Azcárate (Usury Act of 23 July 1908), in Ley 499 de la Compilación del Derecho civil foral de Navarra[33] and the recent art. 621-45, para. 1 of the Código Civil de Cataluña[34], there is no rule that grants a remedy to parties to a contract against the exploitation of weakness, trust or dependence[35]. On the other

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[29] This decision was confirmed by subsequent judgments, including *Cass. Civ.* 2e 5 October 2006 (*D* 2007, p. 2215, with note by G. Raoul-Cormeil).

[30] However, the Reform Ordinance Project of 2015 also includes *"abuse de l'état de nécessité"*. This reference to a needful condition had been criticized by the doctrine for its breadth and imprecision, a potential source of great legal uncertainty (*vid.* J. Klein, "Le consentement", *Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations. Observations et propositions de modifications, La Semaine Juridique, Édition Générale,* supplement to no. 21, 25 March 2015, p. 18).

[31] *Vid. Rapport JO 11 févr. 2016*.

[32] *Vid.* J. Klein, *supra.*

[33] *'Quien haya sufrido lesión enorme, a causa de un contrato oneroso que hubiere aceptado por apremiante necesidad o inexperiencia, podrá pedir la rescisión del mismo. Se entenderá por lesión enorme el perjuicio de más de la mitad del valor de la prestación, estimada al tiempo del contrato. Si el perjuicio excediere de los dos tercios de aquel valor, la lesión se entenderá enormísima'.*

[34] Article 621-45. *Ventaja injusta: '1. El contrato de compraventa y los otros de carácter oneroso pueden rescindirse si, en el momento de la conclusión del contrato, una de las partes dependía de la otra o mantenía con ella una relación especial de confianza, estaba en una situación de vulnerabilidad económica o de necesidad imperiosa, era incapaz de prever las consecuencias de sus actos, manifiestamente ignorante o manifiestamente carente de experiencia, y la otra parte conocía o debía conocer esta situación, se aprovechó de ello y obtuvo un beneficio excesivo o una ventaja manifiestamente injusta'* (Ley 3/2017, 15 February).

[35] In maritime law we find a specific application of this case in art. 8 of Ley 60/1962, of 24 December, on marine assistance, rescues, tows, finds and extractions, which establishes the following: *'[t]odo convenio de auxilio y de salvamento estipulado en el momento y bajo el influjo del peligro podrá ser, a petición de una de las partes, modificado por el Tribunal Marítimo Central, si se estima que las condiciones estipuladas no son equitativas. En todos los casos en que se pruebe que el consentimiento de una de las partes ha sido viciado por dolo o engaño, o, cuando la remuneración esté, por exceso o por defecto,*

hand, art. 1.267 IV CC Spain prevents the acceptance, in the defect of intimidation, of the so-called *temor reverencial* or "reverential fear"; i.e. the fear of displeasing people to whom submission and respect is due.

However, the breadth with which *dolus* or wilful misconduct is defined in art. 1.269 CC Spain has allowed the doctrine and jurisprudence to group together all cases in which there has been bad faith in concluding a contract, whether deceit has been used, or imposition or undue influence[36]. Abuse of weakness, trust or dependence has been introduced in Spain through this door and, although it is true that jurisprudence has not clearly established the confines of this peculiar form of wilful misconduct, we can say that, in all rulings, the following factual circumstances occur: 1) weak bargaining capacity of one party, which the other party maliciously takes advantage of to induce the first party to conclude the contract; and 2) the content of the contract is

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fuera de proporción con el servicio prestado, el convenio podrá ser anulado o modificado por el Tribunal a requerimiento de la parte interesada'.

[36] Early on, this was pronounced by F. De Castro (*El negocio jurídico,* Madrid, Civitas, 1997, § 198, p. 150), for whom this means that contracts can be considered as voidable when one of the parties provokes or takes advantage of a situation of fear or lack of freedom without the notes of art. 1267 CC. Similarly, A.M. Morales Moreno understands that 'incitement of error does not appear as a requirement in the description of the case of art. 1.269 but rather unlawful undue influence. This means the field of application of *dolus* can be widened, covering cases with abuse of situation' ["Comentario de los artículos 1.269 y 1.270", *Comentarios al Código civil y Compilaciones forales*, volume XVII, vol. 1º B, arts. 1.261-1.280 (Dir. M. Albaladejo and S. Díaz Alabart), Madrid, EDERSA, 2004, consulted in vLex]. And also in the same direction, L. Díez Picazo [*Fundamentos del Derecho civil patrimonial, vol. 1º. Introducción. Teoría del contrato.* 6th ed., Cizur Menor (Navarra), Thomson – Civitas, 2007, p. 204]; and M.J. Marín López ["§4. Elementos esenciales del contrato. Elementos accidentales del contrato", in *Tratado de contratos*, t. I, 2nd ed., (dir. R. Bercovitz), Valencia, Tirant lo blanch, 2013, p. 635].

For another area of doctrine, cases of abuse of position do not come under the concept of *dolus*. For Rojo Ajuria the solution in these cases must be found in art. 7 CC (*El dolo en los contratos,* Madrid, Civitas, 1994, p. 253). And A. Carrasco Perera believes that a broad interpretation involves the 'risk of mixing together, in a *totum convolotum*, *dolus*, contractual intimidation and contractual justice contrary to good faith, which must remain as separate remedies' [*Derecho de contratos,* Cizur Menor (Navarra), Aranzadi – Thomson Reuters, 2010*,* p. 335]. Moreover, he is against implementing a rule that typifies this defect in our legal system, arguing the contradiction this entails in a system that does not recognise rescission due to injury, and which 'makes more ineffective secure concepts of law related to the control of content, such as illicit cause or control of public order' (arts. 1.255 y 1.275 CC)" (*supra,* p. 382).

For his part, E. Bosch Capdevila proposes a reinterpretation of the concept of "force" employed in art. 1.267 CC to include cases where the subject does not provoke the situation of need or weakness ("irresistible force") but does exploit this unfairly to his benefit [*vid.* "Book II. Chapter 7. Causas de invalidez del contrato", *Derecho europeo de contratos. Libros II y IV del Marco Común de Referencia* (Coord. A. Vaquer Aloy, E. Bosch Capdevila and M.P. Sánchez González) volume I, Barcelona, Atelier, 2012, pp. 495-496; and "Estado de necesidad y consentimiento contractual y consentimiento contractual. ¿Una reinterpretación de los conceptos de violencia e intimidación como vicios del consentimiento a la luz del Derecho contractual europeo y comparado?" *RCDI,* no. 711, 2009, pp. 66-73 and 90-95].

And in jurisprudence, *vid.* among others, SSTS 23 February 1934 (*RJ* 1934\278); 6 November 1948 (*RJ* 1948\1264); 25 November 1967 (*RJ* 1967\3766); 20 December 1967 (*RJ* 1967\5173); 15 July 1987 (*RJ* 1987\5494); 27 February 1989 (*RJ* 1989\1403), 21 July 1995 (*RJ* 1995\5596); and 28 September 2011 (*RJ* 2011\6586). Regarding the latter, *vid.* the comment by G. Minero Alejandre, *CCJC* no. 89/2012, BIB 2012\1104, consulted in Aranzadi Digital.

beneficial for the agent and detrimental to the other party to the contract[37]. It is important to note that none of these judgments rules that the contract is invalid when bargaining is asymmetric, nor due to injury. On the contrary, if the contract is avoided it is because the bad faith of the party to the contract is proven beyond the personal circumstances of the other party which, although important, are not crucial. What is required is that the party unduly influenced consent which is seriously flawed.

To complete the European panorama in this second group of legal systems, I must refer to Italian law. This is established as a cause for rescinding a contract in arts. 1.447 CC Italy (*contratto concluso in istato di pericolo*)[38] and 1.448 CC Italy (*azione generale di rescissione per lesione*)[39]. The subjective requirement of bad faith in the agent is only demanded in the second case, taking advantage of the other party's need; and the objective aspect in the injury is quantified, exceeding half the value of the benefit. In reality, the objective aspect of the injury is very important in both cases, since art. 1.437 CC It. does not consider, as defect, the mere reverential fear which might also occur in some of the cases that form part of the factual circumstances of the precepts studied. In reality, these are circumstances of qualified injury.

Unlike what happens in Europe or the United States, most of the South American legal systems do not have this legal concept and neither do we find clear solutions in jurisprudence (this is the case in Venezuela, Colombia, Uruguay and Chile). In a large number of these Codes, so-called reverential fear is expressly excluded from duress (art. 1.153 CC Venezuela; art. 1.274 CC Uruguay; art. 1.513 II CC Colombia; art. 1.456 II CC Chile; art. 1.820 CC Mexico; art. 1.114 CC Dominica Rep.; art. 1.268 CC Guatemala; art. 907 CC Haiti; art. 1.558 CC Honduras; art. 2.465 CC Nicaragua…). However, the civil codes from Argentina, Brazil and Mexico are an exception in this area.

The Civil and Commercial Code of Argentina distinguishes between defects of consent and defects of legal acts, including under the latter the case under study, in art. 332, under the term of "*lesión*" (injury)[40]. To establish this, it attends to both

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[37] *Cf.* M. Pasquau Liaño, "Comentario de los artículos 1.269 y 1.270", *Jurisprudencia civil comentada. Código civil,* (dir. M. Pasquau Liaño, coord. K.J. Albiez Dohrmann, A. López Frías), vol. II, 2nd edition, Granada, Comares, 2009, p. 2347.

[38] *'Il contratto con cui una parte ha assunto obbligazioni a condizioni inique, per la necessità, nota alla controparte, di salvare sé o altri dal pericolo attuale di un danno grave alla persona , può essere rescisso sulla domanda della parte che si è obbligata./ Il giudice nel pronunciare la rescissione, può, secondo le circostanze, assegnare un equo compenso all'altra parte per l'opera prestata'.*

[39] *'Se vi è sproporzione tra la prestazione di una parte e quella dell'altra, e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l'altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto./ L'azione non è ammissibile se la lesione non eccede la metà del valore che la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto./ La lesione deve perdurare fino al tempo in cui la domanda è proposta./ Non possono essere rescissi per causa di lesione i contratti aleatori./ Sono salve le disposizioni relative alla rescissione della divisione'.*

[40] *'Puede demandarse la nulidad o la modificación de los actos jurídicos cuando una de las partes explotando la necesidad, debilidad síquica o inexperiencia de la otra, obtuviera por medio de ellos una ventaja patrimonial evidentemente desproporcionada y sin justificación./ Se presume, excepto prueba en contrario, que existe tal explotación en caso de notable desproporción de las prestaciones./ Los cálculos deben hacerse según valores al tiempo del acto y la desproporción debe subsistir en el momento de la*

subjective and objective aspects. Among the former is the situation of the victim, which may be one of need, mental weakness or inexperience; and the exploitation of these circumstances by the agent (i.e. acting contrary to good faith)[41]. And as an objective requirement, evidently disproportionate and unjustified patrimonial advantage is demanded (the advantage is not quantified but left for the court to decide)[42]. When disproportion is notable; i.e. when it can be noticed based on an elementary appreciation, exploitation is presumed of the condition of inferiority and the burden of proof is inverted, with the onus being placed on the defendant[43].

For its part, the Mexican Federal Civil Code regulates the abuse of circumstances in art. 17 with the same subjective and objective aspects[44], and we also find this in the civil codes of the states of Chiapas (art. 1.799); Querétaro (art. 1.702); Oaxaca (art. 16) and Tabasco (art. 27 CC).

Lastly, Brazil's CC contains the legal concept within two precepts in the Italian style, although these are cases of avoidability and not rescission. Consequently, in art. 156 CC Brazil, the avoidability of the contract is established in the case that one of the parties to a contract takes on, in a situation of danger for himself or for someone from his family, an excessively onerous obligation[45]. And art. 157 CC Brazil provides for invalidity due to injury, establishing that there is injury when a person, under urgent need or lack of experience, is forced into a clearly disproportionate benefit given the value of the consideration[46]. Bad faith on the part of the other party to the contract is not required in any of the circumstances.

Regarding the texts harmonising contractual law, it must be noted that all these treat the case as defect of consent, although there are notable differences between

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demanda./ El afectado tiene opción para demandar la nulidad o un reajuste equitativo del convenio, pero la primera de estas acciones se debe transformar en acción de reajuste si éste es ofrecido por el demandado al contestar la demanda./ Sólo el lesionado o sus herederos pueden ejercer la acción'.

[41] *Vid.* M.I. Benavente, "Comentario al art. 332 del Código Civil y Comercial de la Nación", *Código Civil y Comercial de la Nación Comentado, Título Preliminar y Libro Primero, Artículos 1 a 400,* (Dir. M. Herrera, G. Caramelo and S. Picasso), Buenos Aires, Infojus, Sistema argentino de información jurídica, 2015, p. 539.

[42] *Vid.* M.I. Benavente, *supra,* p. 540.

[43] *Ibid.*

[44] *'Cuando alguno, explotando la suma ignorancia, notoria inexperiencia o extrema miseria de otro; obtiene un lucro excesivo que sea evidentemente desproporcionado a lo que él por su parte se obliga, el perjudicado tiene derecho a elegir entre pedir la nulidad del contrato o la reducción equitativa de su obligación, más el pago de los correspondientes daños y perjuicios./ El derecho concedido en este artículo dura un año'*.

[45] Art. 156 *Do Estado de Perigo: 'Configura-se o estado de perigo quando alguém, premido da necessidade de salvar-se, ou a pessoa de sua família, de grave dano conhecido pela outra parte, assume obrigação excessivamente onerosa./ Parágrafo único. Tratando-se de pessoa não pertencente à família do declarante, o juiz decidirá segundo as circunstâncias'.*

[46] Art. 157 *Da Lesão: 'Ocorre a lesão quando uma pessoa, sob premente necessidade, ou por inexperiência, se obriga a prestação manifestamente desproporcional ao valor da prestação oposta./ § 1. Aprecia-se a desproporção das prestações segundo os valores vigentes ao tempo em que foi celebrado o negócio jurídico./ § 2. Não se decretará a anulação do negócio, se for oferecido suplemento suficiente, ou se a parte favorecida concordar com a redução do proveito'.*

some of them regarding the relative weight granted to objective and subjective aspects.

Consequently, art. 3.2.7 (1) of the Unidroit Principles, under "Gross disparity", states that '1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract'.

As can be seen, and unlike what we will see for the other texts, the wording of this precept allows, on occasion, the contract to be avoided without there being any subjective aspect; i.e. due merely to *laesio enormis*[47]. The precept requires excessive disparity between the benefits, granting to one of the parties an excessive and disproportionate advantage. According to the comment, there is excessive advantage when the disequilibrium of the benefits is so great, in accordance with the circumstances, that it shocks 'the conscience of a reasonable person'. And regarding the lack of justification for the advantage, this may be evaluated by virtue of two parameters. The first is a subjective parameter: taking advantage of circumstances of weakness in the other party, such as dependence, need (economic or otherwise), improvidence, ignorance, etc. The second, however, is an objective parameter: the nature and purpose of the contract, a means by which a dangerous pure control is introduced of the contract's content.

The European harmonisation texts regulate this case identically, in arts. 4:109 PECL[48] and II.- 7:207 DCFR[49], fundamentally attending to the existence of defects in the process of forming the contract. Three requirements are demanded so that the defect can be deemed to have occurred.

a) The first of these is the situation of weakness of one of the parties, which may be due to a wide range of circumstances.

b) The second requirement is the bad faith of the other party, who knows or should have known the situation of weakness and takes advantage of it.

c) Lastly, the abusing party to the contract must obtain "excessive benefit" or "grossly unfair advantage". The concept of benefit refers to the price or consideration,

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[47] *Vid.* H.G. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *supra,* p. 595.

[48] Article 4:109 PECL: Excessive Benefit or Unfair Advantage: '(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit'.

[49] Art. II.–7:207 DCFR: Unfair exploitation: '(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage'.

which must be of a higher value than what would be normal in the contract[50]. The concept of grossly unfair advantage goes beyond the economic value of the benefit and allows for a broad evaluation of other circumstances that determine whether the contract is unfair, although the consideration may not be unreasonable[51].

Finally, in the OHADAC Principles, the configuration of the figure of abuse of weakness or dependence in art. 3.4.8[52] pays tribute to the Anglo-Saxon doctrine of undue influence. Contracts may be avoided in those cases where there is a relationship of trust or dependence between the parties to the contract, or when one of the parties to a contract finds himself in a situation of weakness for various reasons (either due to economic distress, urgent needs, ignorance or manifest lack of experience). However, the mere existence of these subjective circumstances is not enough; as clarified by the commentary, it is also necessary that, as a consequence of the contract, there has been excessive benefit for one of the parties which has involved unfair injury for the other. Finally, for the defect to be recognised, knowledge or conscionability of the situation by the benefitting party is required, a condition that is imposed by trade requirements[53].

The OHADAC Principles, however, do not ignore the fact that many of the legal systems in the Caribbean reject the invalidating effects of reverential fear. Consequently, the limits to the application of the solution offered by the OHADAC Principles will depend on the mandatory nature of the exceptions in the aforementioned regulations regarding reverential fear[54].

3. Abuse of circumstances as a limit to private autonomy

The third group is made up of systems in which abuse of weakness, trust or dependence is considered as limiting contractual autonomy, giving rise to the avoidability of the contract. The model is the German system which, in § 138 (1) BGB establishes that a contract is void when it is contrary to public order, specifying in paragraph two that, in particular, the contract is void when one of the parties to the contract obtains a disproportionate advantage, for himself or for a third party, by exploiting the situation of need, inexperience, lack of good judgment or weak will of the other party[55].

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[50] *Vid. Comment D* art. II.-7:207 DCFR,

http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf, p. 533.

[51] *Vid. Comment E* art. II.-7:207 DCFR, *Ibid.*

[52] '1. A party may avoid the contract or a contract term if the other party, at the time the contract was concluded, had taken unfair advantage of the first party´s dependence, trust, economic distress or urgent needs, or of its ignorance or manifest inexperience'.

[53] *Vid.* the comments to art. 3.8.8 OHADAC Principles of F. Esteban de la Rosa (http://www.ohadac.com/textes/2/45/seccion-4-consentimiento-viciado.html).

[54] *Ibid.*

[55] Following the model of § 138 (2) BGB, other legal systems also regulate exploitation of another's weakness to obtain an advantage as a limit to contractual autonomy. This is the case with § 879 (2) 4 ABGB; arts. 178 and 179 CC Greece, which reproduce § 138 (1) and (2) BGB; and § 1796 CC Czech Rep.

§ 138 (2) BGB regulates the invalidity of the commonly called usurious or leonine contracts, and the jurisprudence of the German Supreme Court has declared that its application requires the occurrence not only of the objective aspect of the alleged disparity between both benefits but also the occurrence of some of the circumstances of abuse listed by the regulation; i.e. the presence of the subjective aspect of morally reprehensible conduct[56]. This means that the party to the contract must be aware of the other party's situation of weakness and must intend to benefit from this[57].

But, given that § 138 (2) BGB is merely specifying the general clause stated in the first, non-occurrence of the subjective circumstances described therein does not prevent the contract from being avoided, as it is contrary to *bonos mores* applying the general clause (*wucherähnlichen Geschäften*)[58]. This does not mean, however, that in this case the subjective aspect is eliminated. Jurisprudence has rather insisted that the application of § 138 (1) BGB also requires immoral or reprehensible behaviour (BGH 24 January 1979[59]), since another interpretation would mean the reintroduction into German law of *laesio enormis*, eliminated by those drawing up the BGB[60]. Nevertheless, this subjective requirement has been dismissed as fictitious[61] because the German Supreme Court understands that the circumstances of the case can be presumed. For example, the existence of gross disparity between the parties' benefits[62]. This supposes a *petitio principii* that shifts the whole weight of the law's application onto the objective aspect.

IV. The consequences of abuse of weakness, trust or dependence on the contract

1. Contract invalidity

Legal systems that establish abuse of weakness, trust or dependence as a defect of consent grant the injured party legal standing to avoid the contract. This is the consequence determined by English law for undue influence and the other doctrines; and also the one regulated, among others, in art. 1.143 CC France; art. 3:44 (4) CC Netherlands; art. 282 CC Portugal; art. 21 CO Switzerland; art. 332 Civil and Commercial Code Argentina; arts. 156 and 157 CC Brazil; and art. 17 CC Mexico.

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[56] BGH LM § 154 No. 1, *NJW* 1951, 397; LM (Ba) No. 2; BGHZ 80.153; WM 1982, 849; RGZ 93, 27, 29; OGH SZ 42/2. *Vid.* similarly, C. Armbrüster, § 138, in V.A. *Münchener Kommentar zum Gesetzbuch, Band 1, Allgemeiner Teil*, 6th ed. Munich, Verlag C.H. Beck, 2012, para. 141 and 142, p. 1508; H.G. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *supra,* p. 567 and 576; and H. Dörner, § 138, in V.A. *Bürgerliches Gesetzbuch Handkommentar* (dir. R. Schulze), 6th ed., Baden-Baden, Nomos, 2009, para. 15 and 16, p. 130.

[57] *Vid.* BGH 8 July 1982, NJW 1982.2767, 2768. *Vid.* also K. Larenz and M. Wolf, *Allgemeiner Teil des Bürgerlichen Rechts,* 9th ed., Munich, CH Beck, 2004, § 41, para. 64, p. 750.

[58] *Vid.* C. Armbrüster, *supra;* H. Dörner*, supra,* para. 16, p. 130; and H.G. Beale, B. Fauvarque-Cosson, J. Rutgers, D. Tallon and S. Vogenauer, *supra,* p. 577.

[59] *NJW* 1979, 758.

[60] The wording of the judgment of BGH 12 March 1981, *BGHZ* 80, 153.

[61] *Vid.* C. Armbrüster, *supra,* para. 129 onwards., p. 1505-1506.

[62]BGH WM 1696, 1255, 1257; BGH, *NJW* 1979; 758; BGHZ 80.153,

Regarding the Spanish legal system, the consequence is also the avoidability of the contract, by applying art. 1.269 CC.

For its part, we have already mentioned that Italian law considers this case as rescission of the contract in arts. 1.447 and 1.448 CC Italy, which determines a regime of ex post facto invalidity, although it is also down to the injured party to challenge the contract.

Finally, as we have seen above, the configuration of the case in other legal systems as a limit to autonomy of the will, for determining contracts contrary to *bonos mores* or good morals, means that the contract becomes fully null and void. This is the case in § 138 CC Germany, § 879 (2) 4 CC Austria; arts. 178 and 179 CC Greece and § 1796 CC Czech. Rep.

2. Compensation for damages

Together with the invalidity of the contract, most legal systems admit compensation for damages as a complementary remedy. This remedy requires the party to the contract to know or been able to know, at the time of entering into the contract, that the defect existed[63], a subjective requirement that forms part of the factual circumstances of the defect of abuse of weakness, trust or dependence in almost all legal systems, as undue influence requires awareness of superiority (bad faith on the part of the party to the contract).

3. Adapting the contract

Lastly, some systems allow, as a remedy, the adaptation of the contract. This measure responds to the principle of conserving the contract and highlights the fact that the real problem underlying defects of consent is not merely a question of will but also of organisation of interest, of damages[64].

This is not established in the same way in all those legal systems that allow contracts to be adapted. On the contrary, sometimes it can only be requested by the injured party to the contract as an alternative remedy to avoiding the contract, when this party is still interested in the contract. Such is the case, for example, of the Mexican system (art. 17 CC Mexico). On other occasions adaptation can be initiated by the other party to the contract, who can enforce this should the injured party exercise the power to avoid the contract. This is established in art. 3:54 (1) CC Netherlands, being established as reparation of the detrimental effects of the avoided contract[65],

[63] *Vid.* A.M. Morales Moreno, "¿Es posible construir un sistema precontractual de remedios? Reflexiones sobre la Propuesta de modernización del Derecho de obligaciones y contratos en el marco del Derecho europeo", *Derecho privado europeo y modernización del Derecho contractual en España* (dir. K.J. Albiez Dohrmann, coord. M.L. Palazón Garrido and M.M. Méndez Serrano), Madrid, Atelier, 2011, pp. 410.

[64] *Cf.* A.M. Morales Moreno, "¿Es posible construir…" *supra,* p. 413.

[65] Article 3:54 BW: Offer to repair the disadvantageous effects of the voidable juridical act. '1. The right to appeal to an abuse of circumstances with the purpose to nullify a more-sided (multilateral) juridical act, ceases to exist when the opposite party, within appropriate time, presents an

although paragraph two of this precept broadens the initiative so that either of the parties may ask the courts to adapt the contract[66]. Also included in this group are the Italian legal system (art. 1.450 CC It.) and Brazilian system (art. 157 § 2 CC Br.), which grant the party against whom avoidability has been claimed the right to prevent this by offering to amend the contract and make it fairer. In these cases adaptation is not a remedy but rather operates as an exception (in the broad sense)[67].

Lastly, in other systems and in the harmonisation texts of contractual law, the adaptation of the contract in the cases of abuse of weakness, trust or dependence operates both as a remedy and also as an exception. On the one hand, it is a right of the injured party who is entitled to avoid the contract and who is permitted to demand legal adaptation [art. 283 I CC Portugal[68]; art. 332 (4) C&CC Argentina[69]; art. 3.2.7 (2) PU[70]; art. 4:109 (2) PECL[71] and art. II.-7:207 (2) DCFR[72]]. But it is also a way for the other party to the contract (exception) to prevent avoidability [art. 283 II CC Portugal[73]; art. 332 (4) C&CC Argentina; art. 3.2.7 (3) PU[74]; art. 4:109 (3) PECL[75] and art. II.-7:207 (3) DCFR[76]].

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alternative for the original effects of the voidable juridical act, that puts aside the disadvantageous results of that act sufficiently'.

[66] '2. Upon the request of one or more parties, the court may also, instead of nullifying the voidable juridical act on the ground of an abuse of circumstances, modify its original effects in order to undo its disadvantageous results'.

[67] *Vid.* A.M. Morales Moreno, *supra*

[68] *'Em lugar da anulação, o lesado pode requerer a modificação do negócio segundo juízos de equidade'.*

[69] *'El afectado tiene opción para demandar la nulidad o un reajuste equitativo del convenio, pero la primera de estas acciones se debe transformar en acción de reajuste si éste es ofrecido por el demandado al contestar la demanda'.*

[70] 'Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing'.

[71] 'Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed'.

[72] 'Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed'.

[73] *'Requerida a anulação, a parte contrária tem a faculdade de opor-se ao pedido, declarando aceitar a modificação do negócio nos termos do número anterior*'.

[74] 'A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. Article 3.2.10(2) applies accordingly'.

[75] 'A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for excessive benefit or unfair advantage, provided that this party informs the party which gave the notice promptly after receiving it and before that party has acted in reliance on it'.

[76] 'A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it'**.**

The problems presented by revising the contract in cases of abuse of weakness, trust or dependence are similar *mutatis mutandi* to those arising in cases of hardship, and are related to invading a party's private autonomy. Even more so when, as in the case under study, the adaptation is not configured juridically as a renegotiation of the contract but as a proposed revision by one of the parties. Especially in cases where adaptation operates as an exception, it seems relevant to ask whether it is reasonable that a judge impose certain contractual conditions on the injured party when these are cases in which the other party's conduct has been to some extent reprehensible. Having revealed the bad faith of the other party, surely the party to the contract who has suffered the abuse will not wish to continue the contractual link (even when modified), as he will have lost trust.

V. Third-party abuse of circumstances.

To study this problem, we take as our starting point the following case:

> "A" and "B" are husband and wife. "B", under the undue influence of "A", consents to mortgage the family home in favour of bank "C", as a guarantee for a loan to finance the private company of "A" [*Barclays Bank plc v. O'Brien* (1994)[77]].

In this situation, it is true that the will of "B" has not been formed entirely freely but it is also true that, if the other party ("C") was not involved in the defect, its interests must also be protected.

The solutions provided for this problem by the different legal systems in comparative law are not univocal and two groups must be distinguished. The first of these is made up of systems that admit, in these cases, the avoidability of the contract without establishing requirements regarding the third party. And the second group contains those that give rise to the remedy only if some circumstances occur in the third party that permit it to be considered as in bad faith.

The French system is representative of the first of these groups. As we have already mentioned, after its reform, art. 1.143 CC France classifies abuse of a dependent condition as a form of "violence". This means that art. 1.142 CC France can be applied to the case, which determines violence as a cause to avoid a contract, whether it has been carried out by one party or by a third party. Consequently, in France party B can ask for the contract to be avoided irrespective of whether party C was or not in bad faith; i.e. even when it was unaware of the abuse by party A.

The Civil and Commercial Code of Argentina provides for the case of *dolus* in art. 274, and in 277 regarding intimidation, allowing the contract to be avoided without requiring bad faith on the part of the third party. It does not establish anything for abuse of circumstances, so that whether such precepts could be applied by analogy is a matter for consideration.

In the second group are most of the continental legal systems and also those of Anglo-Saxon origin. In Germany, parallel to that established in § 123 II BGB for *dolus* or

[77] 1 AC 180.

wilful misconduct, jurisprudence has understood that a contract can only be avoided under § 138 BGB in the event of abuse of circumstances by a third party, when the benefitting party had knowledge that the other party had concluded the contract as a consequence of an action against good morals (*contra bonos mores*) by the third party, or had acted complicitly with this party (BGH 24 February 1994[78]). Along the same lines, art. 3:44 (5) CC Netherlands requires bad faith on the part of the third party to avoid the contract. And the same has also been declared by Spanish jurisprudence in relation to third-party *dolus*. For its part, the CC of Mexico, although it does not expressly provide for this case, does contain a similar rule for third-party *dolus* in art. 1.816.

Similarly, in the Anglo-Saxon tradition, a contract can be avoided due to the undue influence of a third party when the party to the contract was aware of the defect of will or, given the circumstances, it is reasonable to conclude the party should have known[79].

Precisely regarding the facts of the case from the beginning of this section (i.e. the guarantees provided by a third party), there is a number of very interesting precedents in English law. According to the judgment in *Barclays Bank* (1994), when the guarantee has been provided by a third party united to the main debtor by a relationship involving risk of undue influence, and the bank knows of the existence of this relationship, it will be presumed that it is implicitly aware (constructive notice) of the fact that consent is defective unless it can be proven that the party had independent advice. This rule was subsequently modified by the judgment regarding the case of *Royal Bank of Scotland v. Etridge* (2001), coining the "put on inquiry" test. This name refers to the bank's obligation to take measures to ensure freely given consent in all cases in which there is a relationship between guarantor and debtor that is not commercial in nature[80]. Such measures are also detailed in *Etridge* and are imposed judicially as a code of conduct. For the contract to be upheld, the bank must provide sufficient proof that a bank representative met privately with the guarantor, whom it informed of the extent of his liability and of the risks involved in the contract; and also that the guarantor was urged to seek advice from an independent lawyer[81]. In practice, mere proof of independent advice prevents the contract from being avoided[82].

Finally, due to the influence of Anglo-Saxon law, the texts of legal harmonisation consider that a contract can be avoided due to third-party abuse of circumstances firstly when the other party must respond for its acts, or the third party participates in performing the contract with the party's assent. Third-party abuse of circumstances is also relevant if the party benefitting from the defect knew or ought to have known of the abuse. Apart from these cases, the contract can also be avoided if it

[78] *NJW* 1994, 1341, 1343.

[79] *Vid.* H.G. Beale, *supra,* § 7-104, p. 651.

[80] [2001] UKHL 44, 87, Lord Clyde.

[81] [2001] UKHL 44, 50, Lord Nicholls.

[82] *Vid.* on this matter, H.G. Beale, *supra.* § 7-105 onwards, p. 651 onwards; and E. Peel, *supra,* § 10-037 onwards, p. 461 onwards.

does not injure the other party when acts in accordance with the contract have yet to be carried out (art. 4111 PECL; art. II. 7:208 DCFR and art. 3.2.8 PU, which contain a general regulation for defects caused by a third party). For their part, the OHADAC Principles offer a simpler wording, without distinction between possible third parties, establishing that the party to the contract suffering the abuse of weakness or dependence caused by the intervention of a third party can avoid the contract provided the other party knew of this or should have known (art. 3.4.9).

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